82-6686

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-v.-

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED

1. Whether judicial consideration of petitioner's claim that his death sentence is constitutionally excessive under Enmund v. Florida, ___U.S. ___, 73 L.Ed.2d 1140 (1982), must be limited to the evidence of record available at trial, when the State, despite timely defense requests, deliberately withheld during trial important evidence that other unknown parties may have been involved in the crimes and may themselves have committed the homicides?

2. Whether petitioner's sentencing jury should have been permitted to consider in mitigation certain evidence withheld by the State which suggested that other unknown parties may have been involved in the crimes and may have themselves committed the homicides?

3. Whether this Court's holding in Enmund v. Florida, __U.S. __, 73 L.Ed.2d 1140 (1982) should be given prospective application only?

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Petitioner Larry Leon Chaney respectfully prays that a writ of certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

CITATION TO OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals affirming the denial of postconviction relief, which has not yet been officially reported, is annexed hereto as Appendix A. The order of the District Court for Tulsa County, Oklahoma, denying postconviction relief, which is unreported, is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on February 3, 1983. By order entered March 25, 1983, Justice White granted an application extending petitioner's time to file a petition for certiorari in this Court to and including May 4, 1983. This Court's jursdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death for the kidnapping and murder of a wealthy Tulsa horse breeder, Mrs. Kendal Ashmore, who disappeared with her Assistant, Ms. Kathy Brown, on March 17, 1977. The two women left their home on the morning of March 17th in a blue and white pickup truck for a meeting at 1:00 P.M. with one "Richard Elliot," an unknown horse buyer. The Ashmore's pickup truck was found abandoned the next morning in an empty Tulsa lot. Mrs. Ashmore's husband, Phillip, subsequently received a series of telephone calls on March 17 and 18, demanding $500,000 and threatening Mrs. Ashmore with death unless the demand was met. The second such telephone call, placed on March 18th, was traced by investigators to a telephone in petitioner's home. Two hours later, a third extortion call was placed from a public telephone booth; petitioner's palm print was discovered on the telephone equipment at this location. At 3:30 A.M. the following morning, police entered petitioner's home, arrested him, and searched the premises. In a wastebasket, they found shreds of paper revealing the notation "1:00 P.M. Thursday Richard Elliot 299-9791." Three days after petitioner's arrest, the bodies of

Mrs. Ashmore and Ms. Brown were discovered strangled and buried in shallow graves on a tract of real estate in which petitioner had a land contract interest some 100 miles from Tulsa.

The State's case against petitioner at trial included no direct evidence that petitioner had been seen near the victims or their pickup truck, near their residence, or at the gravesite. Instead, the State relied upon the strong circumstantial evidence outlined above. Petitioner maintained his innocence of the murder charges throughout the trial. Indeed, one of his witnesses, a forensic pathologist, testified that the two women could not have been strangled before March 21 or March 22, well after petitioner had been taken into custody (Tr. 1036-46).[1/]

Prior to the trial, petitioner's counsel -- aware that the State's case, although strongly implying petitioner's involvement in the kidnapping, did not directly connect his client to the murders -- had filed a Motion to Produce requesting, inter alia, "[s]tatements of all persons who have been interviewed by . . . any . . . governmental agency in connection with the subject matter of this case, . . . 2. [t]ranscriptions of any oral statements made by any person to . . . a member of any . . . governmental agency . . . 4. [t]he names and addresses of all persons who may have some knowledge of the facts involved in the instant case . . . 9. [a]ny and all other evidence now in the custody of the District Attorney's Office . . . which may be favorable to the Defendant or exculpatory." (Motion to Produce, annexed hereto as Appendix C,C1-3.)

1/ Each reference to the transcript of the trial of petitioner's case, held in the District Court for Tulsa County on September 6-15, 1977, will be indicated by the abbreviation "Tr." followed by the page number on which the reference may be found.

The State, in response, produced no evidence suggesting that anyone other than petitioner may have been involved in the crime. Yet four years after petitioner was convicted, requests by a Tulsa newspaper under the federal Freedom of Information Act, 5 U.S.C. §522 (1977),[2/] led to the disclosure of interview reports with three witnesses completed by the Federal Bureau of Investigation within days after the victims' abduction, all of which were turned over to the Tulsa District Attorney at that time (May '81 Tr., 10-17).[3/] These reports (collectively appended to this petition as Exhibit D), concern three incidents connected with the case. Most significantly, one witness[4/] told the reporting FBI agent that "she live[d] in the vicinity of the ASHMORE residence and . . . [was] acquainted with Mrs. ASHMORE and sees her frequently in the vicinity of their residence." (App. D, at D. 7.) The witness reported that "at approximately 4:10 P.M. on Thursday, March 17, 1977" -- three hours after Mrs. Ashmore's scheduled appointment with Mr. Elliot -- "she recognized Mrs. ASHMORE as being in a blue and white pickup truck which she had previously known to be driven by the ASHMORES . . . in front of the Well's Grocery Store . . . [in] Jenks, Oklahoma." (Id.) The witness reported that "Mrs. ASHMORE was under the steering wheel and a man was sitting next to her with a female on the far side." (Id.) The witness was sure of the time, she stated, since she had just picked her son up from school at 4:00 P.M. (id., at D. 8). She also reported having heard fire trucks pass the store while she

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2/ See World Pub. Co. Inc. v. Dep't. of Justice, No. 81-C-601-C (June 17, 1982 N.D. Okla.).

3/ Each reference to the transcript of a hearing held in the District Court for Tulsa County on May 1, 1981 in Chaney v. Oklahoma, No. CRF-77-756, will be indicated by the abbreviation "May '81 Tr." followed by the page number on which the reference may be found.

4/ The identities of all three witnesses were concealed in the copies of the reports made available to defense counsel.

was present (id.); an independent Fire Incident Report confirmed that firetrucks in fact passed the store between 4:08 and 4:11 P.M. (May '81 Tr. 38-39).[5/]

This encounter, petitioner has insisted, is highly material to his defense, since the State's evidence firmly placed petitioner alone, walking in rural Sequoyah County nearly 110 miles from Jenks, between 3:00 P.M. and 3:30 P.M. on the afternoon of March 17th (Tr. 665-88), and placed him at a convenience store in Sequoyah County, still over 100 miles from Jenks, at 4:39 P.M. (Tr. 690-97). The statement would obviously impeach the State's contention at trial that petitioner had strangled the two women and buried them on his property on the afternoon of March 17th. (See, e.g., Tr. 824-32; 1147; 1210-16.)

A second witness reported to the FBI that at approximately 7:30 A.M. on March 18, 1977, as he drove into the area where the Ashmore pickup was found, he "noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building." (App. D, at D. 3.) The witness

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5/ The District Attorney acknowledged that he had received and read this report "several times" (May '81 Tr. 18) and that he knew of nothing prior to trial suggesting that this witness had recanted her testimony (id., at 19). By the time the report became available to petitioner in 1981, the witness had apparently become uncertain about her ability specifically to recollect and identify Mrs. Ashmore (id., 27, 34), but petitioner's counsel offered to prove that the investigating FBI agent, if permitted to testify, would have stated that "he was absolutely and certainly positive that the written reduction of the oral statements made to him by [the witness] . . . was a true and accurate transmission of what had been said to him." (Transcript of July 8, 1981 Hearing in Chaney v. Oklahoma, at 4.)

The witness described the driver of the pickup truck, which was identified as that belonging to the Ashmores, as "a white male, age unknown but neither real old or young, 6', slender build, wearing a light-weight jacket and a hat." (Id.,at 4.) The State did not dispute that this description of the unidentified driver does not match that of petitioner, and other evidence conclusively established that petitioner was at his workplace elsewhere in Tulsa at the time this witness observed the Ashmore pickup truck being driven into the lot (Tr. 302).[6/]

Upon discovering this previously undisclosed evidence in April of 1981, petitioner filed an application for postconviction relief, pursuant to Okla. Stat. tit. 22 §1080 (1980), asserting that the failure of the State to disclose these reports violated this Court's holding in Brady v. Maryland, 373 U.S. 83 (1963). Both the District Court for Tulsa County and the Oklahoma Court of Criminal Appeals rejected petitioner's application. The Court of Criminal Appeals (in an unreported order annexed as Appendix E), reasoned that the undisclosed evidence "was not material" (App. E, at E.1.):

> "Even if the appellant's evidence was viewed in the light most favorable to him, it does not tend to exculpate him. Instead, it merely tends to suggest that appellant was not the only person involved in the kidnapping and murders. If a mysterious second person were the one who actually strangled the victims, the appellant must still be considered a principal in the murders."

(Id.)

6/ The third item of evidence revealed by the FBI reports was that a schoolboy, riding past the site where one State's witness claimed he had the Ashmore pickup under surveillance, stated that he noticed -- not a blue and white pickup such as the Ashmores owned, but "a new looking red pickup with a white stripe across it," which he particularly "noticed . . . because it was shiny red [with] . . . a 'clip-on' type CB antenna on the driver's side of the truck." (App. D, at D. 5.)(The FBI agent confirmed in his report that the youth's school bus had in fact stopped in traffic for a considerable period of time at that location on the day in question. (Id., at D. 6)).

After unsuccessfully petitioning this Court for certiorari,[7/] and pursuing certain other procedural steps,[8/] petitioner filed the present application on June 28, 1982, asserting that imposition of a sentence of death upon him would be excessive and disproportionate punishment in light of this newly discovered evidence. The District Court after learning of this Court's opinion on July 2, 1982 in Enmund v. Florida, ___U.S. ___, 73 L.Ed.2d 1140 (1982), permitted petitioner to amend his application in light of Enmund.

Petitioner called to the District Court's attention that the trial court had charged the jury that "under the law of this State all persons concerned in the commission of crime[sic] . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals" (Jury Instruction No. 4), and that "[a] homicide, although unintended, if committed in the commission of kidnapping constitutes murder in the first degree" (Jury Instruction No. 6). On August 9, 1982, the District Court, after acknowledging "that Enmund v. Florida . . . constitute[s an] intervening change in the law" excusing any failure previously to assert petitioner's claims (App. B, at B. 4), nevertheless denied the application on the merits.

7/ Chaney v. Oklahoma, 456 U.S. 919 (1982)(Brennan & Marshall, JJ., dissenting).

8/ On June 15, 1982, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Oklahoma. That Court dismissed the petition on June 25, 1982, under authority of Rose v. Lundy, 455 U.S. 509 (1982), finding that petitioner had failed to exhaust certain of his constitutional claims. See Chaney v. Meachum, No. 82-C-625-BT (N.D. Okla. June 25, 1982)(order dismissing petition).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner alleged in his application for postconviction relief filed in the District Court on June 28, 1982,that the imposition of a sentence of death in his case, without evidence showing that he took the life of the victim, attempted to take the life of the victim, or intended to take the life of the victim would violate the Eighth and Fourteenth Amendments to the Constitution of the United States. In the hearings held in the District Court on July 7 and 13, 1982, petitioner referred the District Court directly to this Court's holding in Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982),and argued that Enmund required reversal of his death sentence. The District Court rejected petitioner's Enmund claims on two grounds. First, it "presume[d] . . . that Enmund [was] . . . of prospective application only" and was not "applicable to these 1977 circumstances" (App. B, at B. 4 & n.4). Second, the District Court found Enmund to be "distinguishable in both factual and legal content from the instant case." (Id.) Ignoring the substantial newly discovered evidence to which petitioner had directed it and deliberately confining itself to the facts of record in 1977, the District Court found, in contrast to Enmund, that "Petitioner Chaney was, according to all material evidence presented, the one and only actor herein" (App. B., at B.5):

> "Thus not only was Petitioner not himself an accomplice or inferential accomplice to the murder by others, but this record in its entirety is devoid of any competent, material evidence upon which to infer, much less establish, that he himself was merely waiting in the wings while some ' . . . mysterious second person . . .'6/ actually strangled the victims in this case.
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> * * *
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> 6/ Chaney v. State, Okl. Cr., __P. 2d __, "Order Affirming Denial of Post-Conviction Relief (P.C. 81-345, 11-12-81), at page 7. As a point of clarification the Court does note that no

> affirmative proof offered by Petitioner Chaney demonstrated that any other person committed these acts of murder."

(Id.) The District Court, in a footnote, indicated that it was "mindful" of petitioner's newly discovered evidence, but held that "neither the Court nor Petitioner is at liberty to now re-examine the proposed relationship between those facts and the proposition Petitioner now seeks to establish" (App. B, at B.6 n.8). The District Court's opinion additionally placed great reliance upon the trial jury's finding that petitioner had committed the murder "either with premeditation or with the substituted malice" imputed to him under the felony murder theory charged to the jury. (Id., at B. 8.)

In his initial brief in support of his petition-in-error to the Court of Criminal Appeals, petitioner argued that "the jury instructions" in petitioner's case, "allowed the jury to impose the death sentence without a specific finding of perpetration, knowledge, or intent required by Enmund" (Brief in Support, at 1); petitioner further urged that the State's evidence that linked petitioner to the kidnapping did not constitute "evidence that he was the perpetrator, or had knowledge or intent that murder be committed." (Id., at 5.)

In his Supplemental Brief, petitioner also contended that "[t]he holdings in Enmund v. Florida . . . and Eddings v. Oklahoma . . . demand that the sentencing body consider as a mitigating factor the exculpatory evidence denied this petitioner irrespective of an independent due process violation claim under Brady v. Maryland." (Supplemental Brief, at 1-3.) Petitioner contended that the "particular mitigating factor, evidence of another individual who could have been the perpetrator of the murder," was neither presented to nor considered by petitioner's jury solely because of the "failure of the [State] . . . to release clearly exculpatory evidence prior to trial" (id., at 4), and he argued that the State could not constitutionally be

permitted "to profit from its own bad faith and violation of well-known constitutional due process requirements." (Id.)

The Oklahoma Court of Criminal Appeals denied petitioner's claims on their merits.[9/] The Court, accepting the District Court's statement that "'Petitioner Chaney was, according to all material evidence presented, the one and only actor herein,'" agreed that thereby "the trial court properly distinguished Enmund v. Florida, both factually and legally, from petitioner's case." (App. A, at A.4.) The Court summarily dismissed petitioner's argument under Enmund that the trial court's jury instructions impermissibly allowed his jury to impose a sentence of death on no more than a finding of accessorial liability to a felony murder committed by another with the brief observation that, on petitioner's original appeal in 1977, "the jury instructions were found to be proper." (Id.) The Court did not expressly address petitioner's argument under Eddings and the Enmund dissent that petitioner's jury was entitled, at a minimum, to hear in mitigation the evidence suppressed by the State during trial which indicated (i) the possible direct role of other participants in the murder of the two women and (ii) the implausibility of the State's theory that petitioner had personally strangled the victims on March 17th.

9/ The Court of Criminal Appeals expressly found that the District Court had "properly applied the doctrine of Res Judicata in petitioner's subsequent post-conviction application" (App. A., at A. 4), and thus rejected the State's claim that petitioner had procedurally waived these claims.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STATE -- AFTER DELIBERATELY WITHHOLDING EVIDENCE THAT PERSONS OTHER THAN PETITIONER MAY HAVE BEEN INVOLVED IN THE VICTIMS' DEATHS -- CAN REJECT PETITIONER'S CHALLENGE TO HIS DEATH SENTENCE UNDER ENMUND V. FLORIDA SOLELY IN RELIANCE UPON THE RECORD EVIDENCE AVAILABLE TO PETITIONER AT THE TIME OF TRIAL

In Enmund v. Florida, __U.S. __, 73 L.Ed.2d 1140 (1982), this Court vacated Earl Enmund's sentence of death as excessive and disproportionate punishment under the Eighth and Fourteenth Amendments. Although "the record supported . . . the inference that Enmund" had participated willingly in an armed robbery during which an elderly couple had been murdered, Enmund v. Florida, supra, 73 L.Ed.2d at 1145, and indicated that Enmund had been "in the car by the side of the road at the time of the killings, waiting to help the robbers escape," id., the Court found "the record before us [did] not warrant a finding that Enmund had any intention of participating in or facilitating a murder," id. at 1152. Observing that only a minority of jurisdictions (including the State of Oklahoma) would permit the imposition of the death penalty for a vicarious felony murder, id. at 1146-47 and 1148 n.13, the Court held that "[f]or purposes of imposing the death penalty," a defendant's "punishment must be tailored to his personal responsibility and moral guilt," and that a death sentence for one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," id. at 1151, would be constitutionally excessive.

In the present case, although the State possessed no direct evidence that petitioner had killed the victims, it presented a strong circumstantial case that petitioner had been

involved in the victims' kidnapping. Since the jury heard no evidence suggesting that any other suspects might be involved in the crimes and since the bodies were eventually found on petitioner's property, the inference was strong that petitioner had committed not only the kidnappings but the murders as well. Lest the jury hesitate to convict and sentence petitioner to death on such a circumstantial case, moreover, the trial court instructed the jury on principles of accomplice liability -- that "all persons concerned in the commission of crime. . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals," -- and on felony murder -- that "[a] homicide, although unintended, if committed in the commission of kidnapping constitutes murder in the first degree."

Even if the relevant inquiry were limited to the evidence of record, petitioner's case would present a substantial question as to the quantum of circumstantial proof required in a capital case to render harmless a trial court's failure, under Enmund v. Florida, to obtain a specific jury finding that the defendant had killed, attempted to kill or intended to kill. However, the facts on this petition present a somewhat stronger though related question. Here, undisclosed evidence, known to the State prior to trial, was made available to petitioner only four years later, under a federal court order. This newly available evidence, statements by three witnesses given to FBI officials shortly after the crimes, strongly suggests: (i) that there may exist one or even two unidentified participants in the kidnapping;[10/] that (ii) the State's theory, under which

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10/ One would be the "white male . . . 6', slender build, wearing a light-weight jacket and a hat" seen parking the Ashmore pickup on the morning of March 18th. Another might be the passenger, description unknown, seen sitting in the Ashmore pickup on the afternoon of March 17th.

petitioner had himself strangled and buried the victims on the afternoon of March 17th could not be true (since the victims were reported seen in a pickup in Jenks, Oklahoma at 4:10 P.M. on March 17th, over 100 miles from rural Sequoyah County where petitioner was observed by State's witnesses at 3:30 P.M. and later at 4:40 P.M. that afternoon); and that (iii) the testimony of the State's medical expert, suggested that the victims were killed on March 17th, was open to substantial question. The jury never wrestled with the questions posed by this testimony, however, since the State withheld this evidence, despite petitioner's timely and direct written request for all witness statements, all reports of oral statements, and the names of all witnesses.

On these facts, the question before this Court is whether a State may, during a capital trial, suppress evidence which points to the existence of other perpetrators and diminishes the likelihood of defendant's participation in the actual homicide, and thereafter to insist that any evaluation of a defendant's Enmund claim be confined to the evidence of record. Principles of due process announced by the Court in Brady v. Maryland, 373 U.S. 83 (1963), strongly imply that such a course cannot be tolerated in a capital case. In Brady, the Court affirmed the vacatur of a death sentence imposed on a capital inmate whose counsel had been denied pretrial access to an extra-judicial statement made by a co-defendant, admitting responsibility for the actual homicide. Brady v. Maryland, supra, 373 U.S. at 84. The Court held that the Fourteenth Amendment was violated "where the [suppressed] evidence is material either to guilt or to punishment," id. at 87; even if, under Mayland law, the confession could not have reduced petitioner's offense below murder in the first degree, the Court noted, it could have affected petitioner's sentence.

Brady was of course decided under fundamental fairness principles of the Fourteenth Amendment; Enmund has now held that the Eighth Amendment bars any death sentence imposed absent proof that the defendant himself killed, attempted to kill, or intended to kill. If evidence concerning a defendant's culpability for a homicide may not constitutionally be suppressed when, as in Brady, its ultimate significance, if credited, is left to the jury's discretion, surely it may not constitutionally be suppressed when, as here, such evidence might constitutionally require a sentence of life imprisonment if credited. The Oklahoma Court of Criminal Appeals, however, has implicitly held that such newly discovered evidence is irrelevant to its evaluation of petitioner's Enmund claim in this case.

The Court should grant certiorari to address the significant question presented by the opinion of the Oklahoma court.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER IN LIGHT OF ENMUND V. FLORIDA AND EDDINGS V. OKLAHOMA, THE EIGHTH AMENDMENT FORBIDS THE STATE'S SUPPRESSION OF EVIDENCE THAT MIGHT MITIGATE PETITIONER'S CRIME

The opinion of the Oklahoma Court of Criminal Appeals in this case stands not merely at odds with the majority opinion in Enmund v. Florida but with the minority opinion as well. Writing for four members of the Court, Justice O'Connor contended in Enmund that a remand for a new sentencing hearing was required because of "the trial judge's incomplete and erroneous view of the facts of the crime." Enmund v. Florida, __U.S.__, 73 L.Ed. 2d 1140, 1172-73 (1982). The minority reasoned that "in deciding whether or not to impose capital punishment on a felony murderer, a sentencer must consider any relevant evidence or arguments that the death sentence is inappropriate for a particular defendant because of his relative lack of mens rea and his participation in the murder." Enmund v. Florida, supra, 73 L.Ed.2d at 1171-72.

The trial court's "erroneous belief that the petitioner had shot both of the victims" constituted a "fundamental misunderstanding of petitioner's role in the crimes . . . [which] prevented the trial court from considering the 'circumstances of the particular offense' in imposing sentence," thereby violating the Eighth Amendment. Id. at 1173.

The minority opinion in Enmund is fully consistent with the Court's prior teachings on this subject. From Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) through Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court has insisted that "'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of . . . the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" Eddings v. Oklahoma, supra, 455 U.S. at 112.

In Eddings, the constitutional flaw was the trial court's refusal as a matter of law to consider mitigating evidence relevant to the defendant's character: "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Id., at 115. In petitioner's case, the initial fault lay with the prosecutor, not the sentencing authority, who acted unilaterally to "exclud[e] such evidence from [the jury's] consideration" by failing to disclose its existence to petitioner or his counsel prior to trial. Yet upon its discovery, in the proceedings below, the Oklahoma courts implicitly sanctioned the prosecutor's practice by declining to consider the excluded evidence in ruling on petitioner's Enmund claim. It seems constitutionally indefensible to defeat the sentencing jury's obligation to weigh all possible mitigating evidence by permitting the State to conceal the existence of such evidence despite a timely request from the defendant.

For this additional reason, the Court should grant certiorari to review the opinion of the Oklahoma Court of Criminal Appeals.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ENMUND V. FLORIDA IS OF PROSPECTIVE APPLICATION ONLY

The District Court for Tulsa County rejected petitioner's Enmund claim in part because of its "presumption" that "Enmund is of prospective application only." (App. B, at B. 4.) The Court of Criminal Appeals, while not directly addressing this point, found "that the trial court properly distinguished Enmund v. Florida, both factually and legally, from petitioner's case." (App. A, at A. 4.)

This Court in Enmund gave no hint that its opinion should be applied prospectively only. Indeed, the invariable practice of the Court has been to afford retroactive application to any decision finding a procedure under which a sentence of death has been imposed to be constitutionally deficient. See,e.g., Bolden v. Holman, 394 U.S. 478, 484 (1969)(per curiam)(applying Witherspoon v. Illinois, 391 U.S. 510 (1968) retroactively); Moore v. Illinois, 408 U.S. 786 (1972)(applying Furman v. Georgia, 408 U.S. 238 (1972) retroactively); Songer v. Florida, 430 U.S. 952 (1977)(applying Gardner v. Florida, 430 U.S. 349 (1977) retroactively); Jordan v. Arizona, 438 U.S. 911 (1978)(applying Lockett v. Ohio, 438 U.S. 586 (1978) retroactively).

Moreover, departure from this practice would seem contrary to the Court's basic principles governing the retroactivity of its decisions, see, e.g., Hankerson v. North Carolina, 432 U.S. 233 (1977); Ivan V. v. City of New York, 407 U.S. 203 (1972), which look to the risk that a constitutional violation may have "substantially impaired [the] . . . truth-finding function and so raise[d] serious questions about the accuracy of . . .

verdicts," Hankerson v. North Carolina, supra, 432 U.S. at 241. In capital cases, where there exists a constitutionally special "need for reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, supra, 428 U.S. at 305, retroactive application of decisions that impinge on the reliability of a sentencing verdict seems compelled.

The Court should grant certiorari to determine whether Enmund v. Florida should be applied prospectively only.

CONCLUSION

Petitioner's writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Oklahoma Court of Criminal Appeals
February 3, 1983

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 3 1983
Ross N. Lillard, Jr.
CLERK

LARRY LEON CHANEY, Petitioner,	)	
-vs-	)	NO. PC-82-487
THE STATE OF OKLAHOMA, Respondent.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On August 3, 1982, the above petitioner, Larry Leon Chaney, filed his petition in this Court seeking an appeal from denial of post-conviction relief from Tulsa County District Court, Case No. CRF-77-756. Petitioner was allowed additional time in which to file a brief in support of his petition. Thereafter, the Attorney General for the State of Oklahoma was allowed time in which to file a response to petitioner's petition and brief. Oral argument was held in this Court on January 12, 1983. Mr. Allen M. Smallwood represented petitioner and Mr. Robert Nance, Assistant Attorney General, represented the State.

In the order issued by the Tulsa County District Court, the record of facts, which petitioner adopts in his brief, were stated as follows:

1. Petitioner was duly convicted by jury verdict and sentenced to death on September 22, 1977.

2. The petitioner perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, cited as Chaney v. State, 612 P.2d 269 (Okl.Cr.1980), reh.den., (9-12-80), wherein the Court of Criminal Appeals affirmed the petitioner's conviction and sentence of death.

3. Thereafter petitioner sought review in the Supreme Court of the United States, by way of writ of certiorari, which was denied by that Honorable Court, Chaney v. Oklahoma, 450 U.S.1025, 101 S.Ct. 1731, 68 L.Ed.2d 219 (1981).

4. On April 3, 1981, petitioner filed his first Application for Post-Conviction Relief under the auspices of 22 O.S., § 1080 et seq. Thereafter, and subsequent to hearings in the matter, the District Court of Tulsa County entered "Order Denying Application for Post-Conviction Relief."

5. The petitioner appealed said order to the Court of Criminal Appeals of the State of Oklahoma, which resulted in the entry of "Order Affirming Denial of Post-Conviction Relief" on November 12, 1981, in Case No. PC-81-345.

6. From the Court of Criminal Appeals' denial of post-conviction relief, the petitioner again petitioned the United States Supreme Court for review by way of writ of certiorari, which the Supreme Court denied on April 5, 1982.

7. Thereafter, petitioner filed petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Oklahoma, No. 82-C-625-B. Therein, the Court dismissed petitioner's petition for Writ of Habeas Corpus on June 25, 1982, under the authority of Rose v. Lundy, ___ U.S.___, 102 S.Ct. 1198, 71 L.Ed.2d 379(1982).

8. The petitioner next filed the instant Application for Post-Conviction Relief, on June 28, 1982, acknowledging therein at page 3, paragraph V that this is his second such application for post-conviction relief.

9. To the instant application the State of Oklahoma filed its Response, alleging the bar of the doctrine of Res Judicata, 22 O.S., § 1086, on July 2, 1982. Also, on July 2, 1982, the United States Supreme Court entered its decision in Enmund v. Florida,___ U.S.___, 102 S.Ct.___ (1982). Thereafter, on July 7, 1982, a hearing was conducted by the trial court, at which Counsel Smallwood and Assistant District Attorney Raymond were present and presented argument and authority, and at the conclusion of which the Court allowed petitioner until July 13, 1982, to amend his Application for Post-Conviction Relief (if he so desired) to demonstrate in what manner and to what extent the Enmund case served to avoid the bar of Res Judicata, in light of petitioner's specific

record acknowledgment that the present proceeding is his second Application for Post-Conviction Relief.

10. On July 13, 1982, the court conducted further hearing, and again entertained argument and presentation of authority of counsel. As a result of said hearing, Petitioner Chaney's Second Application for Post-Conviction Relief was overruled and denied.

Petitioner asserts in this post-conviction appeal that his conviction should be reversed or his sentence modified because of errors of law committed by the trial court at his hearing on his application for post-conviction relief. He first asserts that by failing to find that the United States Supreme Court decision in Enmund v. Florida, supra, was not sufficient to overcome the bar presented by 22 O.S.1981, § 1086, preventing subsequent application for post-conviction relief was error. And secondly, by finding that 22 O.S.1981, § 1086 constitutes a bar, in a subsequent application, the issue that the petitioner's sentence was disproportionate and excessive in that the trial testimony revealed no evidence showing that petitioner took the life of the victim, attempted to take the life of the victim, or attempted to take that life, in light of the holding in Enmund v. Florida, supra.

The order signed by the Honorable Jay D. Dalton, District Judge, on July 13, 1982, and filed on August 9, 1982, found that the doctrine of Res Judicata applied as a bar to petitioner's filing a subsequent application for post-conviction relief under 22 O.S.1981, § 1086; and that Enmund v. Florida, supra, would constitute intervening change in the law and, in that sense, thereby sufficiently excuse petitioner from earlier raising same under 22 O.S.1981, § 1086, however, the court further found that Enmund v. Florida, supra, is distinguishable in both factual and legal content. Therefore, the Tulsa County District Court further found that Enmund does not afford petitioner support for the relief being sought. Consequently, petitioner's application for post-conviction relief was denied. From that denial this appeal has been perfected.

In his brief filed in this Court, petitioner concedes that 22 O.S.1981, § 1086, would ordinarily constitute a bar to the subsequent filing of applications for post-conviction relief. But, petitioner asserts that Enmund v. Florida, provides that "sufficient reason" for overcoming the bar. The State counters with the argument that "the jury did find that the defendant personally and intentionally (more than inference) committed this murder in the course of a felony, Kidnapping for the purpose of Extortion," and such being the fact Enmund is inapplicable to the facts of petitioner's case.

Also, the district court order distinguishes Enmund from petitioner's case, "...Petitioner Chaney was, according to all material evidence presented, the one and only actor herein." The district court order proceeds to reflect that the jury found that petitioner personally committed the intentional act of murder for which he was charged, thereby taking his case outside the scope of Enmund.

Petitioner also complains of the trial court's instructions numbered 6, 7, and 10. However in the appeal lodged in this Court the jury instructions were found to be proper. Notwithstanding petitioner's contention that the jury made no specific findings of fact regarding the degree of culpability or degree of involvement of petitioner in the felony murder, under the instructions given the jury entered the verdict that petitioner was guilty of the offense of First Degree Murder and imposed the death sentence. Thus, the jury did find that the defendant did personally and intentionally commit the murder of Kendell Inez Ashmore.

NOW THEREFORE, after having considered the petition filed herein and the briefs submitted by petitioner and the respondent, and after hearing oral argument,this Court finds that the trial court properly applied the doctrine of Res Judicata in petitioner's subsequent post-conviction application; and this Court further finds that the trial court properly distinguished Enmund v. Florida, both factually and legally, from petitioner's case.

IT IS THEREFORE THE ORDER OF THIS COURT, that the order of

the Tulsa County District Court denying petitioner's Application for Post-Conviction Relief in that court's case number CRF-77-756, shall be AFFIRMED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of February, 1983.

HEP J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

Clerk

APPENDIX B

Opinion of the District Court for Tulsa County

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

LARRY LEON CHANEY, Petitioner,	)	
-vs-	)	NO. CRF-77-756
THE STATE OF OKLAHOMA, Respondent.	)	

DISTRICT COURT
FILED
AUG 9 1982
DON E. AUSTIN, COURT CLERK
STATE OF OKLAHOMA-TULSA COUNTY

ORDER

This matter comes on for consideration of Petitioner's "Application for Post-Conviction Relief" on July 13, 1982. The Petitioner was not personally present, his presence having been waived, being represented by Counsel, Mr. Allen Smallwood; and the State of Oklahoma was represented by Mr. David L. Moss, District Attorney, Tulsa County, Oklahoma, by Mr. James F. Raymond, Assistant District Attorney. The Court conducted hearing, and having entertained the arguments and authority presented by counsel, and being familiar with the records and files in this case and being familiar in these premises, therefore finds:

I.

RECORD FACTS

1. Petitioner was duly convicted by jury verdict and sentenced to death on September 22, 1977.

2. The Petitioner perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, cited as Chaney v. State, Okl.Cr., 612 P.2d 269 (1980), reh.den., (9-12-80), wherein the Court of Criminal Appeals affirmed the Petitioner's conviction and sentence of death.

3. Thereafter Petitioner sought review in the Supreme Court of the United States, by way of writ of certiorari, which was denied by that Honorable Court, Chaney v. Oklahoma, __ U.S. __ 101 S.Ct. 1731, __ L.Ed.2d (3-23-81).

4. On April 3, 1981, Petitioner filed his first Application for Post-Conviction Relief under the auspices of 22 O.S., §1080 et seq. Thereafter, and subsequent to hearings in the matter, the District Court of Tulsa County entered "Order Denying Application for Post Conviction Relief."

5. The Petitioner appealed said order to the Court of Criminal Appeals of the State of Oklahoma, which resulted in that Honorable Court's entry of "Order Affirming Denial of Post-Conviction Relief" on November 12, 1981, in Case No. PC-81-345.

6. From the Court of Criminal Appeals' denial of post-conviction relief, the Petitioner again petitioned the United States Supreme Court for review by way of writ of certiorari, which the Supreme Court denied on April 5, 1982.

7. Thereafter Petitioner filed petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Oklahoma, No. 82-C-625-B. Therein, the Court dismissed Petitioner's Petition for Writ of Habeas Corpus on June 25, 1982, under the authority of Rose v. Lundy, __ U.S. __, 102 S.Ct. 1198, __ L.Ed.2d __ (1982).

8. The Petitioner next filed the instant Application for Post-Conviction Relief, on June 28, 1982, acknowledging therein at page 3, paragraph V that this is his second such application for post-conviction relief.

9. To the instant application the State of Oklahoma filed its Response, alleging the bar of the doctrine of Res Judicata, 22 O.S., §1086, on July 2, 1982. Also, on July 2, 1982, the United States Supreme Court entered its decision in Enmund v. Florida, __ S.Ct. __, 31 Cr.L. 3149 (No. 81-5321, 7-2-82). Thereafter, on July 7, 1982, a hearing was conducted by the Court, at which Counsel Smallwood and Raymond were present and presented argument and authority, and at the conclusion of which the Court allowed Petitioner until July 13, 1982, to amend his Application for Post-Conviction Relief (if he so desired) to demonstrate in what manner and to what extent the Enmund case served to avoid the

bar of Res Judicata, in light of Petitioner's specific record acknowledgment that the present proceeding is his second Application for Post-Conviction Relief.

10. On July 13, 1982, the court conducted further hearing, and again entertained argument and presentation of authority of counsel. As a result of said hearing, Petitioner Chaney's Second Application for Post-Conviction Relief was overruled and denied, for reasons set forth herein.

II.

THE BAR OF RES JUDICATA

As has been noted herein, the State of Oklahoma's Response interposed the bar of the Doctrine of Res Judicata, which is appropriate under Oklahoma Statute 22 O.S., §1086,[1] and governing case law.[2]

1/. which provides:

> "All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application."

2/. These authorities include: Ellington v. Crisp, Okl.Cr., 547 P.2d 391 (1976); Harrell v. State, Okl.Cr., 493 P.2d 461 (1972); Maines v. State, Okl.Cr., 597 P.2d 774 (1979); White v. White, Okl., 607 P.2d 700 (1980); Gibson v. State, Okl.Cr., 491 P.2d 773 (1971); Grimes v. State, Okl.Cr., 512 P.2d 231 (1973); Horton v. State, Okl.Cr., __ P.2d __ (P.C. 77-629, 1977); Tiffey v. State, Okl.Cr., __ P.2d __ (P.C. 77-605, 1977); Morrison v. State, Okl.Cr., __ P.2d __ (P.C. 77-605, 1977); Hall v. State, Okl.Cr., __ P.2d __ (P.C. 77-853, 1977); Hardin v. State, Okl.Cr., __ P.2d __ (P.C. 78-432, 1978); Blozy v. State, Okl.Cr., __ P.2d __ (P.C. 78-609, 1978); Linebarger v. State, Okl.Cr., __ P.2d __ (P.C. 76-841, 1978); Walters v. State, Okl.Cr., __ P.2d __ (P.C. 78-628, 1978); Castleberry v. State, Okl.Cr., 590 P.2d 697 (1979); Brinlee v. State, Okl.Cr., 544 P.2d 817 (1970); Tate v. State, Okl.Cr., 489 P.2d 501 (1971); Speigel v. State, Okl.Cr., __ P.2d __ (P.C. 77-546, 1977); Smith v. State, Okl.Cr., 546 P.2d 1351 (1976); Poke v. State, Okl.Cr., __ P.2d __ (P.C. 77-648, 1977); Padillow v. State, Okl.Cr., __ P.2d __ (P.C. 76-14, 1976); Lamb v. State, Okl.Cr., __ P.2d __ (P.C. 78-212, 1978); Polk v. State, Okl.Cr., __ P.2d __ (O-78-332, 1978).

The Court, therefore, does find and so hold that the Doctrine of Res Judicata operates to bar Petitioner from presently raising and attempting to litigate matters which either have been raised by him, or could and should have been raised by him in the course of his previous direct appeal, post-conviction action and second appeal.[3] In that the Court of Criminal Appeals has twice reviewed this case on appeal, this Court is bound at this juncture by the doctrine of "law of the case" to the extent that res judicata bars the instant application, e.g., State ex rel. Burk v. Oklahoma City, Okl., 556 P.2d 591 (1976); Berland's Inc. of Tulsa v. Northside Village Shopping Center, Inc., Okl., 447 P.2d 768 (1968); Ada Coca-Cola Bottling Company v. Asberry, Okl., 242 P.2d 417 (1952); Pyle v. Pennington Grocery Company, 101 P.2d 847 (1940); Schneider v. Decker, Okl., 291 P. 80 (1930); Take v. Woodruff, Okl., 300 P. 698 (1931); Davis v. Baum, Okl., 133 P.2d 889 (1943); Grayson v. Smith, Okl., 138 P.2d 530 (1943); Marshall v. Cantrell, Okl., 236 P.2d 262 (1951). The necessary compliance with the appellate court's opinion and mandate applies to all matters which were decided either expressly, or by necessary implication by the appellate court, Cherokee Nation v. State of Oklahoma, 461 F.2d 674 (10th Cir., 1974), cert.Den., 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489; appeal after remand, 490 F.2d 521, cert. den., 94 S.Ct. 3070.

Therefore, the Court finds that the allegations of Petitioner's present Application found at Paragraph IV (page 3) are of such a nature that they are barred by Res Judicata, for reasons above-stated, unless and to the extent Petitioner's citation of Enmund v. Florida, supra, (1) constitutes an intervening change in the

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3/. The Court notes that the Order Denying Post-Conviction Relief entered on July 7, 1981, made specific findings at that time (Paragraph III, pp. 2-3) regarding the res judicata bar. The Court now rules, again, that said doctrine acts as a bar to the matters raised herein by Petitioner, though there is authority to the effect that Petitioner has "no standing" to file a second application for post-conviction relief, Linebarger v. State, supra; in that such issues "... are not properly before the court," Walters v. State, and Hardin, both supra.

law, and (2) is applicable to the facts and circumstances presented herein.

III

THE APPLICABILITY OF ENMUND V. FLORIDA

The Court finds that Enmund v. Florida, supra, would constitute intervening change in the law and, in that sense, thereby sufficiently excuses Petitioner from earlier raising same, 22 O.S., §1086. However, the Court further finds, for reasons set forth below, that Enmund is distinguishable in both factual and legal content from the instant case, and therefore does not afford Petitioner support for the relief presently sought by him, even assuming, arguendo, that Enmund will at some future date be granted retroactive effect, and thus be made chronologically applicable to these 1977 circumstances.[4]

The Court notes this clear and precise statement of the United States Supreme Court in Enmund, __ S.Ct. __, 31 Cr.L. at page 3150:

> "As recounted above, the Florida Supreme Court held that the record supported no more than the inference [sic] that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that the imposition of the death penalty in these circumstances [sic] is inconsistent with the Eighth and Fourteenth amendments. (Emphasis added).[5]

4/. The Court does note in this regard that the act of murder for which Petitioner was convicted occurred in March 1977 and Petitioner was tried that same year, but the Enmund decision was handed down in July of 1982, and does not state that it is to be given retroactive effect. The Court presumes, as it must, that Enmund is of prospective application only.

5/. Noteworthy in this regard is footnote 2, at 31 Cr.L. 3150 wherein the Supreme Court noted that "...the only supportable inference with respect to Enmund's participation was that he drove the getaway car," but that was irrelevant to the issue before the Court, since the Florida Supreme Court had earlier held that "...driving the escape car was enough to warrant conviction and the death penalty..."

In its statutory analysis, The Supreme Court noted at 31 Cr.L. 3152, footnote 15,

> "Three other states -- Idaho, Okla. [sic], and S.D. -- allow a defendant who does not kill or actually kill to be executed only where other aggravating circumstances are present, and in those states the felony murder itself cannot serve as an aggravating circumstance." (Emphasis added)

Enmund, then, stands for this proposition:

> "...in cases such as this one [sic] where the defendant did not commit [sic] the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder..." (at 31 Cr.L. 3152, Emphasis added)

the death penalty may not stand. Indeed,

> "Petitioner's argument is that because he did not kill [sic], attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him.", (At 31 Cr.L. 3153, Emphasis original and supplied).

Said the Supreme Court,

> "...it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others [sic], but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (at 31 Cr. L. 3153, Emphasis Added).

By way of distinction, the Court notes that in the instant case, Petitioner Chaney was, according to all material evidence presented, the one and only actor herein. Thus not only was Petitioner not himself an accomplice or inferential accomplice to the murder by others, but this record in its entirety is devoid of any competent, material evidence upon which to infer, much less establish, that he himself was merely waiting in the wings while some "...mysterious second person..."[6] actually strangled the victims in this case.

The only evidence presented to the jury demonstrated to the jury's satisfaction, beyond a reasonable doubt, that the theory

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6/. Chaney v. State, Okl.Cr., __ P.2d __, "Order Affirming Denial of Post-Conviction Relief" (P.C. 81-345, 11-12-81), at page 1. As a point of clarification the Court does note that no affirmative proof offered by Petitioner Chaney demonstrated that any other person committed these acts of murder.

of the State of Oklahoma was accurate; that is to say, the jury found in the trial of this case, first, that Petitioner Larry Chaney himself, personally, committed the intentional act of murder herein, and only secondarily, that those prime acts were accomplished in the course and within the context of the felony crime of kidnapping for purposes of extortion.[7]

There was no evidence presented in this case which indicated the involvement of any person other than Petitioner Chaney, and therefore the instant facts are wholly distinguishable from those presented in Enmund. In the Enmund case, all the facts from the very outset demonstrated the complicity of three persons, where the actual murderer, the "triggerman" (Sampson Armstrong) told a witness that he had shot the victim in the course of the robbery, and which evidence was corroborated by other trial testimony, Enmund v. State, Fla., 299 So.2d 1362, 1365 (1981). In the Supreme Court's estimation, again, the record "...supported no more than the inference..." that Enmund remained in the getaway car. Similarly, in Enmund, "...the prosecutor maintained in his closing argument that 'Sampson Armstrong killed [sic] the old people.' " (Enmund v. Florida, at 31 Cr.L. 3149, Emphasis added).

In the instant case no evidence[8] was presented which could have established that any person other than Petitioner Chaney

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7/. In light of the fact that Petitioner has not sought to distinguish the relative risk of harm inhering in Edmund's act of robbery from that presented, per se, by the act of kidnapping for purposes of extortion, the Court reserves opinion thereon. Please compare Enmund's statistical discussion of the relatively low probability that commission of the crime of robbery will result in homicide, at 31 Cr.L. 3153-3154.

8/. The Court is mindful that Petitioner's first Application for Post-Conviction Relief raised issues vaguely concerning a second person's involvement. The court has heretofore ruled upon the relative exculpatory nature and materiality of those contended facts, and being affirmed by the mandate of the Court of Criminal Appeals (November 12, 1981), neither the Court nor Petitioner is at liberty to now re-examine the proposed relationship between those facts and the proposition Petitioner now seeks to establish. The Court does observe that neither at trial nor his first Post-Conviction proceeding has Petitioner ever been able to substantiate through evidence in this record that any other person was involved in the act of murder, Petitioner's ipse dixit, non-evidentiary assertions notwithstanding. It is noteworthy that in course of the first Post-Conviction hearings conducted before this Court in 1981, the Petitioner, as movant, did not apparently then see fit to call the so-called "non-disclosed" witnesses to the stand for examination, even to rebut the otherwise unfavorable testimony of the District Attorney, S. M. Fallis, Jr., to the contrary.

committed the act of murder. Thus the Court finds that neither evidence, nor fair inference, in this case even remotely suggests that Larry Chaney was other than the premeditated, personal, and actual murderer of Kendal Inez Ashmore.

The Court further finds that the pleading instrument, the information upon which the State's case revolved; the evidence presented to the jury; and the instructions given to guide them, when taken in conjunction all conclusively demonstrate to the Court's present satisfaction that the Petitioner, Larry Chaney, wilfully and without authority of law, with a premeditated design did personally kill Kendall Inez Ashmore by choking and strangling her to death, being then and there engaged in the commission of the crime of kidnapping for the purpose of extortion. As the Court's instructions to the jury indicated, the State's information alleged not only that Petitioner Chaney did unlawfully and with premeditated design effect the death of Kendal Inez Ashmore, but also that this act was done while Petitioner Chaney was engaged in commission of kidnapping for extortion.[9] The jury was instructed of the burden of the State of Oklahoma to prove these material allegations.[10] The jury was further instructed that Petitioner Chaney could not be convicted of murder unless the victim's death "...and the fact of the killing by the accused..." were each established as independent facts.[11] Instruction Number 5 advised the jury that regardless of malice, a person commits the crime of Murder in the First Degree "...when he takes the life of a human being...", in the commission of a kidnapping. This instruction in its totality, advised the jury that if it found Petitioner Chaney committed the homicide, the fact that he was engaged in the felony of kidnapping merely served to remove from the State the burden of proving a premeditated design to kill the deceased. It required that before the jury could convict Petitioner Chaney, the jury was required to find beyond a reasonable doubt

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9/. "Statement of the Case and Instructions to the Jury".

10/. Instruction #1.

11/. Instruction #2, cf. 21 O.S., §693.

that, (1) Petitioner Chaney committed the homicide, (2) that this homicide was committed in an unlawful, felonious and premeditated manner, or (3) that he committed the homicide while engaged in commission of kidnapping for the purpose of extortion.[12] In that the jury was instructed on first degree manslaughter[13] but instead found Petitioner, the sole defendant herein, guilty of First Degree Murder, the Court can only conclude that the jury, as presumed to discharge its sworn duty, in fact determined through all the instructions that Petitioner Chaney himself committed the act of murder. Even under the circumstances most favorable to Petitioner, must be interpreted to mean that the jury found Petitioner committed this murder either with premeditation or with the substituted malice which Petitioner Chaney demonstrated in so committing murder in the commission of a felony kidnapping. Thus, the Court finds the Enmund circumstances wholly distinguishable and inapposite.

The Court does note, for the record, that it conducted the trial herein, and that it has reviewed the record numerous times during the course of the Petitioner's Application for Post-Conviction Relief. The Court remains firmly convinced of the sufficiency of the evidence by which the jury found Petitioner Chaney guilty of First Degree Murder, and the Court remains equally unconvinced of the Petitioner's vague, yet non-evidentiary, assertions of a mysterious second person suggested to be involved in the murder of Kendal Inez Ashmore. In the Court's opinion, the evidence was in fact overwhelming against Petitioner albeit circumstantial in nature. At no time has the Court been presented with evidence to the contrary, or otherwise even tending to indicate the complicity of any confederate, and this notwithstanding that Petitioner was provided ample opportunity to do so.[14]

12/. See Instruction #7.

13/. See Instruction #8

14/. See Transcript of Proceedings conducted on May 1, 1981, pp. 31-39, wherein Counsel for Petitioner admitted he had spoken with the proposed witnesses, but that he did not choose to call them to testify on Petitioner's behalf.

From start to finish, no evidence has been presented which would even tend to persuade this Court that any person but Petitioner Larry Leon Chaney murdered Kendal Inez Ashmore.

In making such strong, even to the superlative, statements herein, the Court is fully cognizant of the supreme importance of the outcome of this case to both the State of Oklahoma and to Petitioner Chaney personally. That is precisely why the Court feels compelled to state for the record the Court's observation of the sufficiency of the evidence herein.

THEREFORE, for the above and foregoing reasons, the Court finds and does so hold that the Petitioner is barred by the Doctrine of Res Judicata from further proceeding herein. The Court further finds, however, that Enmund v. Florida, supra, does constitute intervening authority, but that it is neither applicable to the facts and circumstances presented in this case, nor does it compel or even suggest the grant of any relief sought herein by Petitioner Chaney.

Therefore, this Second Application for Post-Conviction Relief of Petitioner, Larry Leon Chaney, is overruled and denied, with exception allowed.

Done in open Court this 13th day of July, 1982.

JAY D. DALTON
DISTRICT JUDGE

APPROVED AS TO FORM:

Allen Smallwood
Attorney for Petitioner

James F. Raymond
Assistant District Attorney

[illegible] E. Austin, Court Clerk for Tulsa County, [illegible] do hereby certify that the foregoing is a [illegible] true and full copy of the instrument here [illegible] as appears of record in my office. [illegible] Court of Tulsa County, this [illegible] day [illegible], 19[illegible]

[illegible] E. Austin
Court Clerk

APPENDIX C

Motion to Produce

DISTRICT COURT

FILED

APR 1 1977

DON E. AUSTIN, COURT CLERK
STATE OF OKLAHOMA, TULSA COUNTY

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,

-vs-

LARRY LEE CHANEY, Defendant.

Case No. CRF 77-755
CRF 77-756

MOTION TO PRODUCE

Defendant moves that the State be required to disclose and, if a tangible item is involved, to produce for inspection and/or copying by the Defendant all material in the possession and control of the State in the future, which material may be favorable or exculpatory to the Defendant, which could reasonably affect the determination of the Defendant's guilt or innocence, reduce punishment, is relevant to the subject matter of the charge, or which may in any manner assist the Defendant. Disclosure and production of the material herein requested is to be made without regard to whether the material to be disclosed and produced is considered by the State to be admissible at the trial, and whether or not the State feels the material is exculpatory in nature.

Defendant requests that disclosure and production of said material include, but not be limited to, the following:

OR 1. Statements of all persons who have been interviewed by an agent of the State of Oklahoma, an investigator or member of the Tulsa Police Department or the Tulsa County Sheriff's Office or any other governmental agency in connection with the subject matter of this case, whether or not the State intends to call them to testify at trial, and whether or not,

OR (a) the statement, if in writing, has been signed or approved by the witness.

OR (b) the statement relates to the proposed subject matter of the witness to be called at trial.

OR (c) the statement is merely a summary of the facts related to the interviewer.

OR 2. Stenographic recordings or transcriptions of any oral statement made by any person to an agent of the State, an investi-

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gator, police officer of the Tulsa Police Department, a member of

the Tulsa County Sheriff's Office, or a member of any other governmental agency in connection with the subject matter of the case whether or not,

OR (a) the stenographic recordings or transcriptions are a substantially verbatim recital of teh statement, or

OR (b) the statement was recorded contemporaneously with its making, or

OR (c) the statement relates to the proposed subject matter of the testimony of the witness to be used at trual.

OR 3. The transcript of any statement given to the District Attorney's Office during their investigation concerning the subject matter herein by any persons, whether or not the State intends to call them at the time of the trial, and whether or not the statements were recorded.

OR (a) In addition, transcripts of all polygraph proceedings given to the above named Defendant or any witness or perspective witness, to include all questions asked and all answers elicited by the above mentioned persons.

OR (b) in addition, a copy of the polygraph chart results from which the polygraph examiner formed his opinion.

COMPLIED 4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

COMPLIED 5. The prior criminal record of all persons the State intends to call at time of trial, including indictments, convictions, acquittals, or pending charges. This information is required by the defense to determine whether bias or prejudice exist on the part of the State witnesses and to impeach the credibility of said witnesses if any of them have been convicted of a felony or a misdemeanor involving moral turpitude.

SUST. 6. Any material relating to the competency of witnesses to be called by the State, such as a history of mental illness or psychiatric care or civil or criminal commitment to a State or private mental hospital.

SUST. 7. Written or recorded statements or a summary of any such statements made by the Defendant in this case or copies of any statements, admissions, confessions, or declarations against interest verbatim or otherwise which may have been made by the

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Defendant and the names of the persons taking such statements.

OR 8. The original report of the arresting officer(s) in this case.

JUST 9. Any and all other evidence now in the custody of the District Attorney's Office, the Tulsa Police Department, the Tulsa County Sheriff's Office, or any other agency of the State which may be favorable to the Defendant or exculpatory.

GRANTED 10. All reports of a scientific nature, and the subject matter of these reports, which have been prepared by an expert, technologist, identification officer, or other scientific authority pertaining to any instrument, substance or means allegedly used in the commission of the crime and any report made or which may be made which relates to any fingerprints, ballistics reports, handwriting exemplars, photographs of the crime scene together with the prints, exemplars, photographs or and other scientific material relating to this case which may be exculpatory in nature, or favorable to the Defendant.

GRANTED 11. Any physical or tangible objects in the possession of the District Attorney's Office, the Tulsa Police Department, the Tulsa County Sheriff's Office, the Oklahoma State Bureau of Investigation, or the Federal Bureau of Investigation, or any other governmental agency including, but not limited to, items taken from the Defendant's person or his property, together with any written reports whether of a scientific nature or not, that the State intends to use to connect or identify this Defendant with this alleged crime.

OR. 12. Disclosure of the identity of any informant used by the Tulsa Police Department or expected to be used in the procurement of or use of evidence expected to be used against the Defendant.

OR 13. Any and all oral statements made to any member of the Tulsa Police Department or District Attorney's staff or any other law enforcement offficial.

PRELIMINARY 14. Any inconsistencies between the testimony of State' witnesses at the preliminary hearing or trial of the case and sta ments or reports of statements included within the District At-

C3

torney's case file.

Premature 15. The exact date and time of the alleged kidnapping and alleged murder if known. If not known, any and all information in possession of the State of Oklahoma or any governmental body that would shed light upon the date and time of the alleged crimes in question.

The Defendant therefore respectfully requests the Honorable Court to require the State of Oklahoma to produce all material now known or which may become known, or which through the exercise of due diligence may be learned from the investigating officers or witnesses in the case, which is exculpatory in nature or favorable to the accused, or which may lead to exculpatory material or which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

Defendant further moves this Court to conduct an in camera inspection of the District Attorney's file and order that a neutral and a detached judicial officer may determine the existence or nonexistence of such material.

Attorney for Defendant
Allen M. Smallwood
1717 South Cheyenne
Tulsa, Oklahoma 74119
918-585-9837

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above and foregoing Motion to Produce was delivered to the District Attorney in and for Tulsa County, Oklahoma, on the _____ day of _____, 1977.

DISTRICT COURT
FILED
APR 1 1977
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

Attorney for Defendant
Allen M. Smallwood

C4

APPENDIX D

FBI Witness Reports

FD-204 (Rev. 7-15-75)

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE	OFFICE OF ORIGIN	DATE	INVESTIGATIVE PERIOD
OKLAHOMA CITY	OKLAHOMA CITY	4/5/77	3/17/77 - 4/1/77

TITLE OF CASE
CHANGED
LARRY EUGENE CHANEY, aka 44, 57, 58
Larry L. Chaney
Larry Lee Chaney
Larry Leon Chaney
Lee Leonard Chaney;
KENDAL INEZ ASHMORE (Deceased) 43 77
VICTIM;
KATHY ANNE BROWN (Deceased)
VICTIM

REPORT MADE BY: SA [redacted] BTC — TYPED: jlb

CHARACTER OF CASE: KIDNAPING

Title marked changed to include correct spelling of first name and to include middle name of KENDAL INEZ ASHMORE and to add alias of subject as LARRY LEE CHANEY.

REFERENCES:

Oklahoma City telephone calls to the Bureau 3/17/77 and 3/18/77.
Oklahoma City teletypes to the Bureau 3/18, 19, 22 and 23/77.

- P -

ADMINISTRATIVE:

Although there is no apparent violation of the Federal Kidnapin Statute involved in this matter, upon the recommendation of

ACCOMPLISHMENTS CLAIMED — NONE						ACQUITTALS	CASE HAS BEEN:
CONVIC.	PRETRIAL DIVERSION	FUG.	FINES	SAVINGS	RECOVERIES		PENDING OVER ONE YEAR ☐ YES ☒ PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☒

APPROVED — SPECIAL AGENT IN CHARGE

DO NOT WRITE IN SPACES BELOW

7-17007-15

REC

ST-

DE-

F-

APR 11 1977

COPIES MADE:
1) - Bureau
1 - USA, Tulsa
1 - Tulsa County District Attorney
S. M. FALLIS, JR.
2 - Oklahoma City (7-1327)

Dissemination Record of Attached Report				
Agency				
Request Recd.				
Date Fwd.				
How Fwd.				
By				

Notations: DATA PROC.

APR 26 1977

COVER PAGE

D1

OC 7-1327

U. S. Attorney NATHAN G. GRAHAM, NDO, Tulsa, a copy of this report is being furnished to Tulsa County District Attorney S. M. FALLIS, JR. for his assistance in the prosecution of subject in local court on charges of Kidnaping for Extortion and Murder.

LEAD:

OKLAHOMA CITY

AT TULSA, OKLAHOMA. Will follow local prosecution.

B*
COVER PAGE

FEDERAL BUREAU OF INVESTIGATION

1. Date of transcription 3/24/77

[redacted] b7C D

He is presently caring for stock in the area of 91st Street and Memorial Avenue. He advised he rents this pasture land which he noted is located next to an unoccupied produce building and an abandoned house. He states he makes daily trips to this area for the purpose of tending to his stock.

[redacted] advised at approximately 7:30 A.M. this date he went outside of his residence which is located about one-quarter mile from the above intersection and fed his stock. He stated he then drove up to the rent pasture and as he turned into the gate he noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building. [redacted] stated this occurred between 8:00 and 8:30 A.M. and was positive on the time.

[redacted] stated the truck had just driven in and the man opened the door when he first observed it and therefore he could not tell the direction from which it had been driven. He stated the driver passed in front of the parked truck and walked over to a car that was waiting for him. He advised the car, which he could only describe as being black, was parked on the east side of the building facing south and he could only see a small part of the front end. He advised he did not know if there was another individual in the black car but assumed there was but could not give a description. He advised he saw all of this as he was pulling through the gate and did not actually see the truck driver get into the car but the next time he looked in that vicinity both the driver and the car was gone. He stated he did not know in what direction they had gone but he believes if they had driven west he would have observed them.

[redacted] advised the truck he observed is the truck that is still parked there at the present time in the same location.

All 2C

Interviewed on 3/18/77 at Tulsa, Oklahoma File # Oklahoma City 7-1327

by SA [redacted] b7C Date dictated 3/22/77

SA [redacted]

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

30

He advised the man driving this truck which he observed from approximately 50 yards is a white male, age unknown but neither real old or young, 6', slender build, wearing a light-weight jacket and a hat. No other description recalled.

1.
OC 7-1327
JWF:RLM:ca

The following investigation was conducted by b7C

SA [redacted]

AT TULSA, OKLAHOMA

[redacted] advised he was riding home from school on Thursday, March 17, 1977, on the Jenks Public School Bus and came to the intersection of 91st and Memorial, where the bus turns South on Memorial before arriving at East 98th.

[redacted] advised the time was approximately 4 or 4:30 P.M. and he noticed a new looking red pickup truck with a white stripe across it. He said the reason he noticed this truck was because it was shiny red and he observed a "clip-on" type CB antenna on the driver's side of the truck. [redacted] this truck was parked on the southside of the truck. the Bixby Produce Building, next to it, with the nose of the [redacted] this truck was parked on the south side of truck facing west. He further explained the truck was parked near the awning which hangs over the south side of the building.

[redacted] said he did not observe anyone near the truck at that time. He continued that he saw the truck again in the same place at approximately 5:30 P.M. when he was going to soccer practice the same day [redacted] mother, [redacted] was present and advised [redacted] was familiar with pickup trucks, and said she was confident if he said the truck was red, she would believe it.

[redacted] advised the bus driver was [redacted] who drives bus No. 12 for the Jenks Public School and stated she would contact [redacted] and have her get in touch with the FBI. b7C,D

The following investigation was conducted by b7C

SA [redacted]

On March 21, 1977, [redacted] telephonically advised that she drives the school bus for the Jenks Public School, which passes the intersection of East 91st and South Memorial. On the afternoon of March 17, 1977, she b7C

stopped at this intersection while she was driving on East 91st. There is a large amount of traffic at this intersection and she had to sit there for some period of time until she could turn onto South Memorial. She did not observe any vehicles parked in this area because she was so busy watching traffic. However, she was parked there attempting to turn onto Memorial for a long enough period of time that any of the children on the school bus could have accurately observed any vehicle parked there.

[redacted] stated that a school bus for the Union School System also turns at 91st and Memorial. This bus is unloaded of school children at the time it passes this intersection and the driver would have more time to observe things in the area.

b7C

FD 302 (REV. 11-27-70)

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 3/30/77

[redacted] advised she lives in the vicinity of the ASHMORE residence and she is acquainted with Mrs. ASHMORE and sees her frequently in the vicinity of their residence. She advised she also recognizes the vehicles owned by the ASHMORE's. [redacted] stated that Payton's Grocery Store is located at 91st and Union Streets which is patronized by both Mrs. ASHMORE and herself.

She advised at approximately 4:10 P.M. on Thursday, March 17, 1977, she recognized Mrs. ASHMORE as being in a blue and white pickup truck which she had previously known to be driven by the ASHMORE's. She advised this occurred in front of the Well's Grocery Store, 301 E. Main, Jenks, Oklahoma. She advised she pulled in to the parking lot in front of Well's Grocery Store and when she got out of her car she glanced over to a distance of about 8 or 9 parking spaces and saw Mrs. ASHMORE sitting in a truck with two other people. She advised Mrs. ASHMORE was under the steering wheel and a man was sitting next to her with a female on the far side. She advised she could not describe either of the other two individuals nor could she describe Mrs. ASHMORE's wearing apparel.

She advised she had parked facing the street and Mrs. ASHMORE was parked facing the store west of her. She advised she could not see that there was any problem nor did she notice Mrs. ASHMORE looking at her or talking to anyone in the truck. She advised she just glanced at the truck, recognized Mrs. ASHMORE and turned to enter the store. She advised she came out approximately ten minutes later and the truck was gone.

She advised there were no other vehicles parked between her car and Mrs. ASHMORE's truck.

Interviewed on 3/22/77 at Tulsa, Oklahoma File # Oklahoma City 7-1327

by [redacted] Date dictated 3/28/77

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency;

She stated she is certain of the time in view of the fact she had picked her son up at school at 4:00 P.M. and drove straight to the store. She advised while in the store parking lot she recalled two firetrucks and two police cars with sirens went by the store.

APPENDIX E

Opinion of the Oklahoma Court of Criminal Appeals
November 12, 1981

NOV 12 1981
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY LEON CHANEY, Appellant,	)	
-vs-	)	No. PC-81-345
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Larry Leon Chaney has appealed from an order of the District Court of Tulsa County, denying his application for post-conviction relief in Tulsa County Case No. CRF-77-756. He contends that he was denied a fair trial because the State suppressed exculpatory evidence.

In the appellant's pretrial discovery motion he asked for the names "of all persons who may have some knowledge of the facts involved in the instant case." The district court granted that motion. Now, in his post-conviction proceeding, the appellant alleges that three people interviewed by investigating officers gave statements which would tend to exculpate him. He says that he was not furnished this information before his trial, and asks that a new trial be ordered.

Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the fact that the prosecutor was acting in good faith in failing to disclose evidence is irrelevant. What matters is whether the evidence is material to guilt or punishment. After examining the exhibits provided by the appellant and the transcript of the post-conviction hearing held in the district court, this Court concludes that the evidence raised was not material.

Even if the appellant's evidence was viewed in the light most favorable to him, it does not tend to exculpate him. Instead, it merely tends to suggest that the appellant was not the only person involved in the kidnappings and murders. If a mysterious second person were the one who actually strangled the victims, the appellant must still be considered a principal in the murders.

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the district court denying post-conviction relief should be, and same hereby is, affirmed.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT this 12th day of November, 1981.

TOM BRETT, PRESIDING JUDGE

HEZ J. BUSSEY, JUDGE

TOM R. CORNISH, JUDGE

ATTEST:

Clerk

82-6686

Office-Supreme Court, U.S.
RECEIVED
MAY 4 1983
MAY 6 - 1983
ALEXANDER L. STEVAS,
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JUN 2 PAGE 10

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-v.-

STATE OF OKLAHOMA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Larry Leon Chaney, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma. Mr. Chaney's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,	:	
Petitioner,	:	
-against-	:	AFFIDAVIT
STATE OF OKLAHOMA,	:	
Respondent.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am an attorney for Larry Leon Chaney, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Chaney's motion for leave to proceed in forma pauperis. My representation of Mr. Chaney is without remuneration.

2. Mr. Chaney is presently in the custody of the State of Oklahoma and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Chaney and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Chaney is attached hereto.

3. I am informed and believe that because of his poverty, Mr. Chaney is unable to pay the costs of this cause or to give security for same.

4. I believe that Mr. Chaney is entitled to redress in this action.

JOHN CHARLES BOGER

Subscribed and sworn to

before me this 4th day of May, 1983.

NOTARY PUBLIC

JUDITH A. REED
Notary Public, State of New York
No. 60-4640243
Qualified in Westchester County
Commission Expires March 30, 19 84

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY, Petitioner, -v.- STATE OF OKLAHOMA, Respondent.	AFFIDAVIT

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) : ss:

LARRY LEON CHANEY, being duly sworn, deposes and says in support of his motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to redress.

5. The nature of said cause is briefly stated as follows:

I was convicted in the District Court for Tulsa County, Oklahoma, a trial court of the State of Oklahoma, of murder and was sentenced to death. I am being held at the Oklahoma State Penitentiary at McAlester, Oklahoma. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction was imposed upon me in violation of my constitutional rights.

_____
LARRY LEON CHANEY

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG): ss:

The foregoing affidavit of Larry Leon Chaney was subscribed and sworn to before me this day of

_____
NOTARY PUBLIC

Office-Supreme Court, U.S.
FILED
MAY 23 1983
ALEXANDER L. STEVAS,
CLERK

JUN 2 PAGE 10

IN THE SUPREME COURT OF THE UNITED STATES

LARRY LEON CHANEY,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent.

No. 82-6686

AFFIDAVIT

STATE OF OKLAHOMA)
) ss.
COUNTY OF PITTSBURG)

I, LARRY LEON CHANEY, being duly sworn upon my oath, depose and state in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of filing fees; I own no real or personal property; I am incarcerated; unable to make bond; and receive no income from earning.

3. I am unable to give security for said costs.

4. Although my counsel has been paid certain sum in the past by my relatives, at the present time he is being paid sums only sufficient to maintain the out-of-pocket costs of pursuing my appeals and he is presently serving without remuneration.

5. I believe that I am entitled to relief under my petition for writ of certiorari.

6. The nature of said cause is briefly stated as follows:

I was convicted in the District Court of Tulsa County, Oklahoma, a trial court in the State of Oklahoma, of First Degree Murder while engaged in the act of kidnapping for purposes of extortion, and was sentenced to death. I am presently being held on death row at the Oklahoma State Penitentiary in McAlester, Oklahoma. I believe that errors were committed during the course

of the trial of my case which consists of bad faith denial of production of exculpatory evidence by the respondent prior to the trial of my case, during the trial of my case, and since that time up and until the date of this Affidavit. I further believe that newly-discovered evidence after the trial of my case constitutes errors of a constitutional nature and that my conviction and death sentence were imposed upon me in violation of those constitutional rights by which I am aggrieved and seek redress. I further state that I am scheduled to be executed by lethal injection on June 24, 1983, at the Oklahoma State Penitentiary in McAlester, Oklahoma.

Larry L. Chaney

LARRY LEON CHANEY

STATE OF OKLAHOMA)
) ss.
COUNTY OF PITTSBURG)

I, Larry Leon Chaney, of lawful age and after having been first duly sworn upon my oath, state:

That I am the petitioner above named; that I have read the above and foregoing Affidavit; that I know of the contents thereof; that all the facts therein contained are true and correct to the best of my knowledge and belief.

Larry L. Chaney

LARRY LEON CHANEY

Subscribed and sworn to before me this 17 day of May, 1983.

James R. Eastham

Notary Public

My Commission Expires:

6-25-85